In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-26

ERNEST MCNEAL, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 39-41) is reported at 490 F. 2d 206.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1973. A petition for rehearing was denied on June 4, 1974 (Pet. App. 42). The petition for a writ of certiorari, filed on July 29, 1974, is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the master jury list from which the grand jury which indicted petitioner was selected was properly compiled.

2. Whether the trial judge properly limited the cross-examination of government witnesses on collateral matters.

3. Whether petitioner was entitled to introduce extrinsic evidence to impeach a government witness on collateral matters.

4. Whether the undercover agent's failure to preserve two items given him by petitioner violated due process of law.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on three counts charging him with the purchase of 17.7 grams of heroin not in a stamped package (Count 1), sale of that heroin without the requisite order form (Count 2), and a subsequent sale of 41 grams of heroin similarly without an order form, in violation of 26 U.S.C. (1964 ed.) 4704(a) and 4705(a). He was sentenced to concurrent terms of ten, fifteen, and fifteen years' imprisonment on the three counts. The court of appeals affirmed (Pet. App. 39-41; 490 F. 2d 206).

The evidence showed that on February 3, 1970, undercover narcotics agent Garfield Hammonds, Jr. and an informant, Oranetta Burton, went to 915 Collingwood Street, where Hammonds and petitioner negotiated for the sale of heroin to the agent at a later date (Tr. 91-93).[1]

Three days later Agent Hammonds and Miss Burton drove to 3643 Waterloo Street where they met petitioner, DeVon Quinn, and two others. Hammonds stated that he was prepared to buy five packages of heroin at a price

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[1]"Tr." refers to the four-volume transcript of trial, which has been filed with the Clerk of this Court.

of $175 each. Petitioner sent Quinn to get the packages, but Quinn reported that he had only one left (Tr. 94-96, 343). Petitioner then led Hammonds to his apartment on Collingwood Street where petitioner produced a shoe box containing numerous small envelopes, a sifter, a bag of powder, and jars containing dilutants. He used these and other implements to fill five envelopes with a mixture of powders, 71.3% heroin (Tr. 97-102, 311, 344-347). Petitioner gave the envelopes to Miss Burton. Hammonds gave petitioner $800 and received a $5 bill as change (Tr. 102). Petitioner gave Hammonds a note with two telephone numbers which could be used to contact him (Tr. 107).

On February 16, 1970, Hammonds telephoned petitioner and arranged for a second heroin purchase. Hammonds subsequently purchased ten packages, each containing 60.3% heroin, directly from petitioner for $1,500 (Tr. 110, 313-316).

At trial, petitioner, his wife, and DeVon Quinn all denied ever meeting Agent Hammonds. Petitioner testified that he had never sold drugs; that long before the transactions testified to by government witnesses he had been fully aware that Miss Burton had agreed to cooperate with the government; and that he had never seen DeVon Quinn at the Waterloo Street address (Tr. 526-572). Petitioner acknowledged that he had resided at the Waterloo Street address until October 1969 when he moved to Collingwood Street.

ARGUMENT

1. Petitioner contends that the voter registration list used for the jury wheel to select grand jurors was not the most recent one; that the list had not been procured directly from the City of Detroit's Election

Commission, but rather was a xeroxed copy of a list supplied to a local court; that the jury clerk was aided by an unauthorized person (her sister) in filling the master jury wheel; and that the clerk was known to have removed records from her office in order to work on them at home after normal working hours.

a. As a practical matter, however, the registration list used in determining eligibility for grand jury service was the most recent one available. The plan adopted by the Eastern District of Michigan pursuant to the Jury Selection Act of 1968, 28 U.S.C. 1861, *et seq.*, required the master jury wheel to be filled between August 1 and December 1, 1968. On August 1, when the work was officially begun, the voter registration list for 1967, based upon the November 1966 federal election, was the latest available list, and was the one used in the process of selecting random names from over 600 communities in the Eastern District of Michigan. It was not necessary that the process be halted and begun anew because other voter registration lists based upon the 1968 federal primary election held on August 6, 1968, became available some time before December 1, 1968. In the absence of any proof of a systematic exclusion of any cognizable class, petitioner suffered no constitutional or statutory wrong because the 1967 voter registration lists were used to determine the membership of the grand jury which indicted him. See the discussion in *United States* v. *Matthews*, 350 F. Supp. 1103 (D. Del.), by a district judge who was a member of the Judicial Conference which drafted the Jury Selection Act. The cases relied upon by petitioner, *e.g.*, *United States* v. *Guzman*, 468 F. 2d 1245 (C.A. 2), certiorari denied, 410 U.S. 937, are not to the contrary.

b. The clerk's decision to obtain xeroxed copies of the current registration list then in the hands of the local Recorder's Court, rather than order a new list from the Election Commission at a cost of a half-cent per name (Pet. App. 52), was not prohibited by 28 U.S.C. 1869(c), which defines voter registration lists as the "official records maintained by State or local election officials," since the court's list originated with the Election Commission.

c. Petitioner presents no evidence that the jury list was in any way tainted because the jury clerk had her sister assist in filling the jury wheel or because the clerk often did work at home after hours. The jury clerk's sister was not shown to have played a role in the actual selection of names for the jury wheel, nor was there any evidence of misconduct on her part (Pet. App. 40). Nor, finally, was there any evidence that the records removed from the clerk's office included the jury list. Even assuming *arguendo* that the jury list was removed, there was no evidence that the removal was done for any deceptive purpose, or that the list was improperly manipulated after hours.

2. During the lengthy cross-examinations of Agent Hammonds and Miss Burton (Tr. 111-214, 351-478), on several occasions the court prevented defense counsel from inquiring into matters that were irrelevant or collateral to the proceedings, such as where the agent had taught school before joining the federal service (Tr. 112), why the agent had not arrested petitioner immediately after the second transaction (Tr. 211-212), the circumstances underlying Miss Burton's previous felony conviction (Tr. 411), her employment prior to 1970 (Tr. 423-424), the source of the cocaine which Miss Burton admitted once having sniffed (Tr. 425-426),

her previous arrests and testimony given in any other proceedings (Tr. 445), the whereabouts of a child Miss Burton had borne to the brother of DeVon Quinn (Tr. 455-458), and her knowledge of one George Blair, who had no relationship to this case (Tr. 449, 468).[2] Moreover, the court permitted Miss Burton to invoke her privilege against self-incrimination and refuse to answer questions concerning her use of cocaine or marihuana (Tr. 425, 438) and involvement in drug traffic (Tr. 427).[3]

The limitations set by the trial judge were well within his discretion to determine the scope of relevant cross-examination. The questioning he disallowed involved irrelevant matters that tended to divert the jury's attention from the crucial question of guilt or innocence of the defendant. *Glasser* v. *United States*, 315 U.S. 60, 83; *United States* v. *Lawrance*, 498 F. 2d 1065 (C.A. 5); *United States* v.

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[2]Although prevented from raising the identity of George Blair through the cross-examination of Miss Burton, defense counsel later elicited a statement from petitioner that Miss Burton had worked as a prostitute for Blair (Tr. 527). On government counsel's objection, this remark was stricken.

[3]The record does not support petitioner's allegation (Pet. 17) that the court allowed Miss Burton to assert the Fifth Amendment privilege when asked whether she had ever testified falsely (Tr. 449-451). Miss Burton replied that she had never tesitifed falsely under oath (Tr. 452). The final paragraph at Pet. 17 asserts that the court refused to allow the witness to discuss her involvement in a robbery offense which she had admitted. Defense counsel attempted to adduce this testimony from the attorney who had represented Miss Burton at the state trial. Miss Burton was allowed to invoke the attorney-client privilege to prevent the attorney from divulging statements she had made to him regarding the incident (Tr. 633-654).

Miller, 478 F. 2d 1315 (C.A. 2), certiorari denied, 414 U.S. 851; *United States* v. *Hiken*, 458 F. 2d 24 (C.A. 8), certiorari denied, 409 U.S. 842. Miss Burton was permitted to assert her Fifth Amendment privilege over a collateral matter of minimal relevance which created no substantial danger of prejudice and did not deprive petitioner of the ability otherwise to test the credibility of her direct testimony. Accordingly, no error was committed. *United States* v. *Rogers*, 475 F. 2d 821 (C.A. 7); *United States* v. *Norman*, 402 F. 2d 73 (C.A. 9), certiorari denied, 397 U.S. 938; *Fountain* v. *United States*, 384 F. 2d 624 (C.A. 5), certiorari denied *sub. nom. Marshall* v. *United States*, 390 U.S. 1005; *Smith* v. *United States*, 331 F. 2d 265 (C.A. 8), certiorari denied, 379 U.S. 824; *United States* v. *Cardillo*, 316 F. 2d 606 (C.A. 2), certiorari denied, 375 U.S. 822.[4]

3. Contrary to petitioner's assertion, he was not deprived of his right to offer witnesses (Pet. 23-27). He was merely denied the opportunity to rebut Miss Burton's testimony on certain collateral matters by eliciting testimony from his proposed witnesses which

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[4]The authorities relied upon by petitioner are inapposite. In *Pointer* v. *Texas*, 380 U.S. 400, this Court held that the transcript of testimony of a witness given at a preliminary hearing where the accused had no counsel and did not cross-examine could not be used at trial in place of the witness who had moved out of the state. The Court noted that the ruling would have been different had Pointer been represented by counsel at the prior hearing. *Id.* at 407. In *Branzburg* v. *Hayes*, 408 U.S. 665, the Court ruled that the First Amendment did not relieve a newspaper reporter of his obligation to respond to a grand jury subpoena and answer questions relevant to a criminal investigation. The Court in *Branzburg* did not examine the scope of what might be deemed relevant questions, and *Pointer* obviously has no application to the situation presented here.

would tend to contradict her. The court did not abuse its discretion in prohibiting the presentation of extrinsic proof tending to contradict some of Miss Burton's testimony on cross-examination. *Corpus* v. *Beto*, 469 F. 2d 953 (C.A. 5), certiorari denied *sub nom. Corpus* v. *Estelle*, 414 U.S. 932; *Tinker* v. *United States*, 417 F. 2d 542 (C.A. D.C.), certiorari denied, 396 U.S. 864; *United States* v. *Franzese*, 392 F. 2d 954 (C.A. 2), vacated on other grounds *sub nom. Giordano* v. *United States*, 394 U.S. 310; see *United States* v. *Lambert*, 463 F. 2d 552 (C.A. 7); *Byrd* v. *United States*, 314 F. 2d 336 (C.A. 5), certiorari denied, 375 U.S. 816; 3A Wigmore, *Evidence*, §§1002-1003 (Chadbourne ed., 1970).

4. Petitioner's claim that the failure of Agent Hammonds to preserve two items received from petitioner at the close of the first heroin transaction violated due process is unwarranted. The two items were a $5 bill given Agent Hammonds as change and a slip of paper upon which petitioner had written two telephone numbers where he could be reached. Neither item was potentially "favorable" to petitioner under *Brady* v. *Maryland*, 373 U.S. 83. Moreover, petitioner presented no evidence of intentional suppression or bad faith destruction of these items. *United States* v. *Augenblick*, 393 U.S. 348; *United States* v. *Henry*, 487 F. 2d 912 (C.A. 9); *United States* v. *Sewar*, 468 F. 2d 236 (C.A. 9), certiorari denied, 410 U.S.

916; *United States* v. *Augello*, 451 F. 2d 1167 (C.A. 2), certiorari denied, 405 U.S. 1070; *United States* v. *Shafer*, 445 F. 2d 579 (C.A. 7), certiorari denied, 404 U.S. 986.[5]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[5]In *United States* v. *Bryant*, 439 F. 2d 642 (C.A. D.C.), relied upon by petitioner, the court of appeals admonished the government that thereafter it would be held strictly liable for intentionally failing to preserve evidence gathered in the course of a criminal investigation. Read in light of succeeding cases from that circuit, e.g., *United States* v. *Barnes*, 464 F. 2d 828 (C.A. D.C.) certiorari denied, 410 U.S. 986, and *United States* v. *Clemons*, 445 F. 2d 711 (C.A. D.C.), certiorari denied, 404 U.S. 956, the *Bryant* ruling does not compel a contrary result here.